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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

October Term, 1951.

No. 624.

ROSE CADDEN,
Petitioner,

vs.

COMMONWEALTH OF KENTUCKY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Rose Cadden prays that a writ of certiorari issue to review the judgment entered in this case as modified on denial of rehearing on October 5, 1951, by the Court of Appeals of the Commonwealth of Kentucky.

OPINIONS BELOW.

The Jefferson Circuit Court, Criminal Branch, rendered an opinion on December 23, 1950 (R. 93-101). The opinion of the Court of Appeals of Kentucky is reported in South Western Reporter, Second Series 242, pages 409-415, under date of November 6, 1951.

JURISDICTION.

The opinion of the Court of Appeals was entered on October 5, 1951 (R. 128-137). The jurisdiction of this Court is invoked under Section 1257 (3) and Section 2101(c), Judicial Code, as amended by Act of May 24, 1949; and an order Extending Time to File Petition for Writ of Certiorari to March 1, 1952, issued by the Honorable Stanley Reed, Associate Justice of the Supreme Court of the United States.

QUESTIONS PRESENTED.

(1) Whether the Court of Appeals of Kentucky can deprive petitioner of due process of law guaranteed by Amendments IV, V, VI and XIV of the United States by holding in its opinion the judgment of lunacy void (R. 134) and then apply the doctrine of waiver and estoppel against her (R. 137), leaving the petitioner with the permanent stigma of the adjudication of lunacy recorded against her and her posterity, on the public records of Jefferson County, Kentucky, when petitioner was, and is now, sane.

(2) Whether petitioner can be arrested, while she was in her home alone, on an illegal warrant issued prior to the filing of the petition for a lunacy inquest, in violation of Kentucky Revised Statutes 202.060(2), and imprisoned and held incommunicado for seven days prior to her trial of inquest without a preliminary hearing and without counsel before trial, which was requested but refused, and without the right to

inform her relatives, pastor and friends of her whereabouts while so incarcerated, all of which was denied her, without violating Amendments IV, V, VI and XIV of the Constitution of the United States.

(3) Whether the Court of Appeals of Kentucky deprived petitioner of her fundamental rights guaranteed by Amendments V and XIV of the Constitution of the United States when it held the judgment void, after finding there was "no notice at all" (R. 133), except the alleged service of a paper called "Notice" (denied by petitioner) issued by the Commonwealth Attorney (who had no authority to issue a summons, which authority is vested only in the clerk) (Section 40, Kentucky Civil Code of Practice); and, when the alleged service of the "Notice" was made by M. Casper (denied by petitioner) (R. 5), who had no authority to make such service (Section 47, Kentucky Civil Code of Practice and R. 5) when his affidavit of the return was not attested by the clerk until one year after the alleged service of the "Notice" (R. 5).

(4) Whether petitioner can be imprisoned forcibly and held incommunicado and be denied due process of law, including the right to be in court and be heard at her alleged trial of inquest in person and by counsel of her own choice when she was both physically and mentally capable of being present in court (R. 9-11, and R. 37-47, 108, 109).

(5) Whether petitioner, while imprisoned incommunicado can be adjudged a lunatic in her enforced absence, without counsel of her own choice which she

requested, but was refused, and without effective representation by the court-appointed attorney who did not even consult petitioner (R. 10 and R. 108-109) and who himself says concerning such appointment: "That he has no recollection of ever having been appointed to defend the said Rose Cadden at the said time or at any other time" . . . and has no office record of the case (R. 12), without being deprived of due process of law guaranteed by Amendments V, VI and XIV of the Constitution of the United States.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

Article 7, Bill of Rights, Constitution of Kentucky, provides:

The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

Kentucky Revised Statutes 202.030 provides in part:

(1) Any reputable resident of the county having knowledge of a person in the county not serving a sentence in a penitentiary or a reformatory, who appears to be either feeble-minded, epileptic, insane or an idiot, and who is not in a state or a private institution for the care of such person, may file a petition with the circuit clerk for the trial and committment of such person, setting forth facts verified by affidavit. The affidavit may be upon information and belief.

Kentucky Revised Statutes 202.040 provides:

The petition shall set forth:

(1) The name and residence of the person concerning whom the petition is filed;

(2) The name and residence of the parents, if known, and of the husband or wife, if any; and

(3) The name and residence of the person having custody of such person, or if no such person is known, then of some near relative or that such is unknown.

Kentucky Revised Statutes 202.050 provides:

In each inquest the court shall appoint a member of the bar to represent and protect the interests of the defendant, and the attorney for the Commonwealth also shall prevent the finding of any person to be of unsound mind who, in his opinion, is not such.

Kentucky Revised Statutes 202.060 provides in part:

(1) All persons named in the petition, including the defendant, if of legal age, shall be notified of the proceeding by a summons issued requiring the person having custody or residing with the defendant, to appear with the defendant at a time and place stated in the summons, not less than three days after service. The parents of the defendant, if living, if their residence be known to the petitioner, or the legal guardian, if one there be, and his residence is known to the petitioner, or if there be neither parent nor guardian whose residence is known to the petitioner, then some near relative, if his residence is known to the petitioner, shall also be notified of the proceedings . . .

(2) If the petition alleges that the defendant is of violent character and is dangerous, a warrant may be issued for his arrest.

Kentucky Revised Statutes 202.080 provides:

In proceeding under this chapter the defendant appearing before the court, or any person interested in the defendant, may demand a trial by jury, which shall be granted as in other cases, unless waived, or the court on its own motion may call a jury to try the case. The court in its discretion may conduct the trial or inquest in chambers.

Kentucky Revised Statutes 202.100 provides in part:

(1) When the petition mentioned in KRS 202.040 has been properly filed with the clerk of the court, the court shall appoint two physicians to examine the defendant and to certify to the court as to their findings in the case.

Kentucky Revised Statutes 202.110 provides in part:

(1) The certificate shall state that the defendant has been examined by each of the medical examiners making the certificate within three days prior to the date of the certificate, and that in their judgment he is an idiot or is feeble-minded, epileptic or insane, if such be the fact, and that he requires supervision, control and care for his own welfare or for the welfare of others or of the community.

Kentucky Revised Statutes 202.130 provides in part:

No inquest shall be held unless the defendant is in court, except when it appears from the oath or affidavit of two regular practicing physicians that they have personally examined him and that they believe that his condition is such that it would be unsafe to bring him into court.

Kentucky Revised Statutes 202.290 provides:

(1) Whenever it appears from an affidavit filed with the court in which a person has been adjudged of unsound mind, that such person has been restored to his proper senses or that the inquest was false or fraudulent, the court shall forthwith direct the facts to be inquired into by a jury in open court and shall make all necessary orders in the premises.

(2) If the jury finds such person to be of sound mind, the court shall enter an order and judgment restoring the person and giving him all the rights and privileges of a person of sound mind.

Kentucky Civil Code of Practice, Section 40, provides:

The summons shall command the officer to whom it is directed to summon the defendant named therein to answer the petition filed by the plaintiff, giving his name, at a time stated therein, under the penalty of the petition being taken for confessed, or of the defendant being proceeded against for contempt of court on his failure to do so. The summons shall be dated the day it is issued and be signed by the clerk.

Kentucky Civil Code of Practice, Section 47, provides:

The summons may be served:

(1) By the officer to whom it is directed, or any officer to whom it might have been directed, and his return thereon shall be proof of the time and manner of service.

(2) Service by person appointed by officer. By any person appointed by the officer to whom it is directed, by an indorsement on the summons; and the affidavit of such person indorsed therein shall be proof of the time and manner of service.

STATEMENT OF FACTS.

Petitioner was arrested in her home by two police officers on June 28, 1949, on Warrant No. 6012 issued by the Clerk of the Police Court, Louisville, Kentucky, upon application of her husband, wherein she was charged with being "Guilty of Disorderly Conduct OBS" (meaning held for observation). The Warrant directed that she be forthwith brought before the Louisville Police Judge. Instead petitioner was imprisoned until July 5, 1949 (R. 9-10-11), in the Psychiatric Ward of the Louisville General Hospital without any hearing or trial (R. 60-61) photostatic copy Warrant and return). She was held incommunicado, and denied assistance of legal counsel, her pastor, her parents or the solace of friends and relatives (R. 9-11).

On July 1, 1949, a member of the hospital staff filed a petition for a lunacy inquest pursuant to *Kentucky Revised Statutes* 202.030 and 202.040 in the Jefferson Circuit Court, Criminal Branch (R. 2). The petition failed to allege petitioner was "of violent character and is dangerous" as required by *Kentucky Revised Statutes (hereinafter referred to as KRS)* 202.060 to form the only basis for the issuance of a warrant of arrest of a person charged of being of unsound mind.

The joint report of the two court appointed medical examiners (R. 2-3) fails to conform to the requirements of *KRS* 202.110 and 202.130, in that they did not report they each personally examined petitioner, or certify to any of the facts and circumstances upon

which their judgment was based finding her to be insane, or that her condition was such that it would be unsafe to bring her into court.

The record shows that Gordon Kinsey, attorney, was appointed "to protect the interests" of petitioner at the alleged trial of July 5, 1949 (R. 2), pursuant to the provisions of *KRS* 202.050. This attorney in an affidavit said "that he has no recollection of ever having been appointed to defend the said Rose Cadden at said time or at any other time; that as he believes, he was not present at the time of trial, therefore he has no office record of any such proceeding" (R. 12-13).

Neither petitioner nor her custodian, the Superintendent of the Louisville General Hospital, was served with a summons, as none was issued notifying them of the inquest, which fact is admitted by the respondent (R. 16), contrary to *KRS* 202.060. Respondent admits petitioner was not present at her inquest (R. 16).

At the time of her arrest petitioner was in good health, and mentally and physically able to attend her inquest, which right was denied her. The original trial record is silent as to why she was denied her right to be present at her trial and to face her accusers in person and with the effective assistance of counsel (R. 9-11).

On July 5, 1949, petitioner was committed to Central State Hospital of Kentucky for the Insane (R. 2) where she remained until she was paroled to her sister then living in Pittsburgh, Pennsylvania, on July 20, 1949 (R. 45), until which time she had been denied the assistance of legal counsel.

On October 5, 1949, petitioner came to Louisville, Ky., with her sister from Pittsburg, Pa., to attempt a reconciliation with her husband, James J. Cadden, when he swore to Warrant No. 7456 and had her arrested at 1:00 A. M. October 6, 1949, while she was asleep in her room with her sister at the Kentucky Hotel in Louisville, Ky. (R. 59, 73—also App. 1, p. 55).

By petition dated February 21, 1950, the petitioner prayed the court wherein she had previously been illegally convicted of lunacy, to impanel a jury to pass upon her then mental condition (R. 7). The verdict was that petitioner "is a person of sound mind and capable of managing her estate" (R. 6).

Petitioner on March 28, 1950, while she was still on parole, was again illegally arrested on a Bench Warrant (R. 126c) obtained by her husband from the Deputy Clerk of the Jefferson Circuit Court, Criminal Branch, wherein she was commanded to answer a non-existent indictment allegedly returned against her charging her with lunacy. Petitioner was again placed in jail. Upon a hearing before the Judge of said court, she was again paroled to one of her present counsel. This Bench Warrant was issued pursuant to the second petition for a lunacy inquest (R. 126 a-b). An attack by Motion to Quash the return on said warrant was *sustained.* Respondent obtained leave to amend that petition (R. 105). It was amended charging that petitioner "is of violent character and is dangerous." Such amendment was necessary to form the basis of her arrest on a legal warrant, however, none was ever obtained. The court later sustained respondent's own

motion to dismiss the second petition as amended without prejudice (R. 107), the respondent acting by Special Counsel, as Commonwealth Attorney did not participate. Before such dismissal, the judge had already pre-judged petitioner by signing said lunacy order book (R. 126 b), finding her to be insane and a lunatic.

On May 23, 1950, petitioner filed a motion to vacate the void judgment of lunacy and of restoration, making a direct attack thereon in the Criminal Branch wherein they had been obtained (R. 8). An amended and supplemental petition to vacate was filed among other pleadings, *charging violations of petitioner's State and Federal constitutional rights* (R. 85-89).

While petitioner's motion to vacate the void judgment of lunacy was pending, petitioner filed a suit for divorce in the Jefferson Circuit Court, Chancery Branch, in which she also sought custody of her infant son who had been hidden by her husband and kept away from her. Her husband defended by having certain psychiatrists (who had aided him in the respondent's name in railroading her to the insane asylum, namely, Drs. Misch Casper, G. C. Kelly, William Keller and A. R. Kasey, Jr.) make affidavits as to petitioner's insanity and without petitioner being given the right to cross-examine them. In substance these affidavits indicated one year after the doctors had seen petitioner that she was mentally incompetent to have the care, custody and control of her child (R. 62-68).

On December 1, 1951, the Chancellor in the divorce action, in spite of all of the brazen efforts to prove

petitioner insane, awarded her full and complete custody of the child. This action was not before the judge of the Criminal Branch of the court (see Appendix 1, p. 57, for the Chancellor's Opinion).

In that companion case to the one now before this court, the Chancellor in his opinion in the divorce action of *Cadden* v. *Cadden* found that the husband charged respondent herein to be insane and not the proper person to have custody of their child (App. 1, p. 37). The husband stated at all times since the institution of the lunacy proceeding "he acted solely upon advice of competent doctors and attorneys" (App. 1, p. 36).

The Chancellor was not impressed with the testimony of psychiatrists offered by the respondent because they didn't give petitioner as thorough an examination as Drs. Crice and Render, the latter two of whom state respondent was not insane (App. 1, p. 42). The standard formula used by psychiatrists to test mentality of petitioner is set out (App. 1, pp. 43-48). The Chancellor analyzing the testimony of several psychiatrists (App. 1, pp. 49-57) for and principally against petitioner and considering the testimony of a neutral witness, Mrs. A. E. Broderick, outlines *three persecutions of respondent.*

The Chancellor then found, "when we study the history of this case as attempted to be revealed in this opinion we find there is great justification for her belief that she is being persecuted. We find before this action (divorce action) was begun she had been arrested as a lunatic and confined and tried without

the benefit of counsel of her own choosing, possibly any counsel at all, and convicted in Criminal Court on a lunacy charge and committed to Central State Hospital" (App. 1, p. 54). "That was her first persecution" (App. 1, p. 55).

The Chancellor found she was again arrested around October 1, 1949, while at her hotel room and was again put in jail in another psychopathic section. At that time she sought counsel and no trial was had on that lunacy warrant. That was her second persecution (App. 1, p. 55).

The Chancellor found her third persecution to have occurred when she was again arrested on March 29, 1950. He found in no case of the three arrests did she have any advance notice that she was to be arrested but was taken by surprise in a summary manner without the advice of counsel or chance to protect herself (App. 1, p. 55).

The Chancellor took "judicial notice of the fact that this lady (petitioner) has been under a very severe strain, enough to upset the stability of an ordinary person, and in spite of all that she has conducted herself in such a manner under such provocation as deserves commendation and credit instead of abuse and discredit" (App. 1, p. 56).

The court said he was not satisfied with the way the case has been practiced by counsel for the husband because, "it is evident the plaintiff's attempt to kill her son was deliberately hatched and prepared by the defendant" to bolster his, the husband's, claim petitioner was not the fit person to have custody of the child.

The Chancellor found James J. Cadden's testimony is "not worthy of belief" (App. 1, p. 56), and awarded "full and complete custody of her son, James J. Cadden, Jr." to petitioner (App. 1, p. 57).

In this case, the findings of the Chancellor state better than we can, the viciousness and untiring efforts put forth by James J. Cadden, Sr., and his advisers, who started the litigation in Police Court on June 28, 1949, to arrest, convict, commit and to forever stigmatize petitioner as a lunatic when she, in truth and in fact, is not and never has been insane.

Respondent in its answer herein injected incompetent and improper issues and offered incompetent evidence from the divorce case having no bearing on the question of the validity of the judgment of lunacy (R. 75-84, 115-123).

To stop further arrests, Petitioner filed a civil suit in the Jefferson Circuit Court, Common Pleas Branch, against Drs. G. C. Kelly, Misch Casper, William Keller, John D. Trawick, Hollis Johnson and Edward Cadden (the latter being a brother of the petitioner's husband), charging them with conspiracy to have petitioner falsely arrested, adjudicated and committed to an asylum (R. 75-76). The lower court gave credence to the plea that no conspiracy existed against petitioner and sanctioned much incompetent and irrelevant matters while ignoring entirely petitioner's constitutional rights of being present in court, of being summoned to her alleged trial, of defending the charge against her in person and by counsel, of being represented by counsel of her own choice which she requested but was

denied, and of having effective legal representation by the attorney named by the court to defend her at the inquest (R. 93-101). Most of these things the Court of Appeals sanctioned in the opinion (R. 150-159), except it held the judgment was in fact void, but turned right around and held that petitioner, because she asked to be restored waived her right to attack the void judgment and is estopped thereby (R. 156).

SPECIFICATION OF ERRORS TO BE URGED.

(1) In placing undue emphasis on form rather than on substance to circumvent petitioner's constitutional rights guaranteed by Amendments V, VI, and XIV by holding that petitioner upon the filing of her petition in the same lower court before whom she stands convicted, and asking for another jury to pass upon her mental condition several months after her conviction under a void lunacy proceeding, retroactively entered her general appearance to the original lunacy proceeding thereby waiving all jurisdictional defects and estopping petitioner from attacking the void judgment of lunacy.

(2) In giving legal cognizance and efficacy to the paper called "NOTICE" which was issued by the Commonwealth Attorney in violation of *Civil Code of Practice,* Section 40; and, the alleged service thereof on petitioner, which she denies, in violation of *Civil Code of Practice,* Section 47, by M. Casper, while petitioner was imprisoned incommunicado in the Psychiatric Ward of the Louisville General Hospital. This alleged serv-

ice by M. Casper was made without legal authority in that it was not endorsed by the person to whom it should have been directed. The return was not supported by an affidavit of M. Casper before the trial and not until a year after its purported service which was also after petitioner began her attack upon the void judgment of lunacy.

(3) In upholding the lower court to the effect that petitioner had a trial.

(4) In upholding the lower court in its finding of fact that petitioner was represented by legal counsel and her interests protected by the court appointed attorney where that attorney himself said he had no recollection of such appointment or office record of the case; and, where no consultation was had with the petitioner on or before the date of her alleged trial (R. 10, 14).

(5) Through silence, upholding the arrest of petitioner in violation of *Kentucky Revised Statutes* 202.-060 (2) on a disorderly conduct warrant (observation) obtained before a petition for a lunacy inquest was filed upon which a warrant of arrest could be issued; and, condoning petitioner's imprisonment incommunicado, without being given the opportunity of employing legal counsel which she requested but was refused, and to communicate with relatives, her Pastor or friends who may have assisted her.

(6) In effect upholding *Kentucky Revised Statutes* 202.080 and making it appear that petitioner can waive her right to a trial by jury according to the ancient

mode of trial by jury required by *Section* 7 (*Bill of Rights*) *Constitution of Kentucky*, when that statute itself is unconstitutional because the Court of Appeals of Kentucky has said a lunacy inquest is neither a civil nor a criminal proceeding, but is a special proceeding *quasi*-criminal in nature. Hager v. Pacific Mutual Life Insurance Co., 43 Federal Supplement 22.

(7) In upholding the lower court's findings of fact that there was no conspiracy among the doctors to convict petitioner and to imprison her as was done when that was not an issue in the case before the court but was surreptitiously brought into the case by respondent to prejudice the court which it did.

(8) In upholding the Jefferson Circuit Court, Criminal Branch, and in effect by silence upholding the Louisville Police Department and Court.

REASONS FOR GRANTING THE WRIT.

In Kentucky a lunacy inquest, because it involves the personal liberty of the defendant, is considered a *quasi*-criminal proceeding. *Sabin* v. *Commonwealth*, 233 Ky. 636. Petitioner while being held in the Psychiatric Ward in the hospital was questioned and required to give the evidence which convicted her through a secret Star-Chamber method. This began upon her arrest on June 28, 1949 on Warrant 6012 charging her with being guilty of disorderly conduct obs (meaning held for observation) (R. 60-61), and continued through July 5, 1949, the date of the infamous inquisi-

tion had in her absence while she was held incommunicado and without counsel (R. 9, 108). Petitioner while small in stature had good health, was, and is sane, and highly intelligent (R. 37-41, 108-109) had domestic trouble with James J. Cadden, Sr., her husband, and his family. She was much upset over her difficulties which facts when related to her inquisitors in the Psychiatric Ward were considered to be hallucinations and formed the basis for the erroneous conclusions of the doctors who only made superficial examinations of her.

Petitioner was never taken before the Louisville Police Judge as Warrant 6012, sworn to by her husband, directed, but was taken immediately to the Psychiatric Ward of the Louisville General Hospital as indicated on the back of the warrant for observation by Dr. Trawick, a private psychiatrist (R. 60-61). Warrant 6012 was attacked in Police Court (R. 107-112) but motion to quash was overruled. Appeal to Criminal Branch, Jefferson Circuit Court, was dismissed (R. 92).

On July 1, 1949, a petition for an inquest was filed in the Jefferson Circuit Court, Criminal Branch (R. 2) charging petitioner with lunacy pursuant to *KRS* 202.030 and 202.040. The petitioner failed to allege that petitioner "is of violent character and is dangerous" as provided in *KRS* 202.060 (2) only upon which a warrant could be issued for the arrest of petitioner. She therefore, was not before the criminal court by warrant to give it jurisdiction of her person.

KRS 202.060 (1) provides that "all persons named

in the petition including the defendant" "shall be notified of the proceeding by a summons issued." No part of this statute was complied with.

THE "NOTICE."

The only attempt in this case at giving the kind of notice of the impending lunacy proceeding which could possibly satisfy petitioner's constitutional rights as guaranteed by Amendments V and XIV is embodied in the paper psuedonomously called "Notice" which was issued by the Commonwealth Attorney (R. 5). The "Notice" falls far short of meeting the requirements of a summons as specified by Section 40, *Civil Code of Practice of Kentucky.* The alleged service of the "Notice" is clearly as void as the judgment of lunacy itself.

KRS 202.060 (1) is clear. It provides that a summons be issued to notify the defendant and others of the proceedings. Section 40, *Civil Code of Practice* sets forth the form and requisites of a summons in Kentucky among which is the requirement that it be dated, directed to some officer for service and signed by the clerk of the court. The "Notice" was not signed by the clerk, nor was it directed to anyone for service, nor was it dated.

In *Aetna Insurance Co.* v. *Hallack,* 73 U. S. 556, this court held the failure to affix a seal on a process where required under the law of the state rendered a sale of land void. Since the "Notice" was not signed by the clerk of the Jefferson Circuit Court, Criminal

Branch the lunacy proceeding was void. It was no notice at all even if served on defendant. Petitioner denied such service. No copy of it was left with her (R. 9-11). Only M. Casper said it was served.

The return on the "Notice", even admitting for the purpose of argument that the "Notice" satisfied the statute as to form and content, and notwithstanding the opinion of the Court of Appeals in that respect, is evidence of a deplorable situation existing in this case which does not satisfy the kind of notice to which petitioner is entitled under the *Federal Constitution, Amendments V and XIV.*

We will dwell upon the return. It purports to have been served by M. Casper on July 2, 1949. Dr. Casper was one of the two medical examiners appointed by the court pursuant to *KRS* 202.100 (1) to personally examine petitioner and to report the facts and circumstances of his finding of lunacy which he did not do. His report shows that is true (R. 3). The record shows M. Casper had no authority to serve the "Notice." *Civil Code of Practice* 47 directs who shall serve a summons when the same is served by one other than to whom it is directed. By that provision of the Code the summons must be endorsed by the person to whom it was directed for service and also the person making the service must make affidavit as to the manner of service. Neither of these requirements were met. Even respondent admits no summons were served (R. 16, par. 1-2).

As the record of the return made by M. Casper stood on *July 5, 1949*, it conclusively showed no service was had because the clerk did not take the acknowledgment of M. Casper until *July 5, 1950* (R. 5), if at that time.

Then, too, even had the "Notice" been properly served by M. Casper on July 2, 1949, it could not possibly have served the purpose for which the notice contemplated by Amendments V and XIV of the Constitution of the United States was intended for the obvious reason that the petitioner was at that very time *being imprisoned incommunicado,* with all personal liberties suppressed and wholly unable to enlist the aid of friends, her pastor or legal counsel (R. 9-11, 108-109).

These indignities, perhaps, would amount to little if petitioner were in fact a raving maniac, or even in fact insane, when she was not. She was in good health physically and mentally.

The rights of a religious, decent, frugal and respected citizen and devoted mother to have her record cleared of the infamous record of arrests and illegal conviction of lunacy are at stake in this case.

Even a most vicious criminal is treated legally in Kentucky with much more regard and his statutory and constitutional rights are carefully protected by the courts.

The Supreme Court in *Simon* v. *Craft,* 182 U. S. 427, said: "The essential elements of due process of law are notice and opportunity to defend. In determining whether such rights were denied we are governed

by the substance of things and not by mere form," and cited *Louisville & Nashville R. R. Co.* v. *Schmidt,* 177 U. S. 230 in support thereof.

As to the sufficiency of notice required by due process of law in *Glidden* v. *Harrington,* 189 U. S. 255, this court said: "It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive, or unjust that they are declared to be not due process of law."

The facts of petitioner's case show clearly the whole lunacy proceeding to the end was arbitrary, oppressive and unjust.

COUNSEL.

Under *KRS* 202.050, an attorney, Gordon Kinsey, appears to have been named by the court "to represent and protect the interests of the defendant" at her inquest on July 5, 1949 (R. 2-3). Prior to that date there is nothing in the record showing that she had counsel and petitioner charged she never had an opportunity to employ counsel or knew she had been tried until after the trial (R. 9-11). Even Gordon Kinsey has no recollection or record of ever representing petitioner (R. 12-13. The only evidence in the record is the affidavit of the Clerk of the Court, who after petitioner's attack on the void judgment had been filed, recalled so vividly that Gordon Kinsey defended petitioner, which affidavit was given credence by the lower court and the Court of Appeals of Kentucky even as against this

attorney's own statement that he didn't recall or have any office record of the case (R. 21).

What representation and protection was given petitioner is unknown to the court appointed attorney whose testimony is undisputed, except by the clerk of the court. Petitioner didn't even know she was being tried until she learned she had been convicted of lunacy and committed to Central State Hospital, Lakeland, Kentucky, on July 5, 1949 (R. 108).

This court in *Powell* v. *State of Alabama,* 287 U. S. 45, said; "but passing that" (meaning the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process) "and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of the opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative *that the failure of the trial court to make an effective appointment* of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment. Whether this would be so in other criminal prosecutions, or under other circumstances, we need not determine. All that is necessary now to decide, as we do decide, is that in a capital

case, where the defendant is unable to employ counsel, and is *incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.*" Citing *Holden* v. *Hardy,* 169 U. S. 366, 389. The case was upheld in *Williams* v. *Kaiser,* 65 S. Ct. 363.

In the recent case of *Hawk* v. *Olson,* 66 S. Ct. 116, this court also held that denial of effective assistance of counsel violates due process.

The fact that petitioner did not have due process of law is well recognized by the Chancellor in his opinion of December 1, 1951 in the case of Cadden v. Cadden, when he said "We find before this action was begun she had been arrested as a lunatic and confined and tried without the benefit of counsel of her own choosing, possibly, any counsel at all, and convicted in Criminal Court on a lunacy charge and committed to Central State Hospital" (App. 1, p. 54).

The Court of Appeals of Kentucky in that divorce action upon an application for an injunction made by James J. Cadden, Sr., after the Chancellor denied such an injunction, sustained the Chancellor and permitted the petitioner to retain full and complete custody of her child.

We urge that the subject of a lunacy inquest is entitled to all of the protection afforded by the fundamen-

tal law guaranteed persons charged with capital offenses because a conviction of lunacy immediately denies the subject of his personal liberty, and he ceases to be *sui juris* for an indefinite period of time possibly for life. The stain of conviction may thus remain against petitioner for life and on her posterity.

In *Re Oliver,* 68 S. Ct. 499, this court also recognized the importance of the rights of one accused of contempt of court (not a capital offense) to be afforded "a reasonable opportunity to defend himself against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence, and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel," and we submit that every one of these basic rights have been flagrantly flouted and cast aside by the courts of Kentucky in the present case.

WAIVERS.

In *Johnson* v. *Zerbst,* 304 U. S. 1019, this court pointed out "courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an *intentional relinquishment* or abandonment of a known right or privilege. The determination of

whether there has been an intelligent waiver of right *to counsel* must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

The facts in the case at bar show no effective representation of counsel was afforded petitioner by the mere appointment of Gordon Kinsey.

The apparent willingness of the courts of Kentucky to circumvent petitioner's substantial constitutional rights is not explained satisfactorily which, we assume, is based on the desire of the courts to accept incompetent and irrelevant evidence introduced by the respondent concerning a suit against several doctors in the hearing had on December 23, 1950, on petitioner's motion to vacate the judgment of lunacy, which judgment of lunacy the Court of Appeals recognized was void.

To apply the doctrine of waiver operates to deny petitioner the right to have her day in court, which she never has had, to be heard in person and by counsel before a court having jurisdiction of her person under the circumstances herein is clearly a denial of petitioner's rights to have due process of law as guaranteed by Amendments V, VI and XIV.

It is true that the courts of this country generally hold that void judgments cannot be validated in any manner. The Court of Appeals in *Hill* v. *Hill,* 299 Ky. 351, so held. The Supreme Court of the United States has said in *Essanay Film Mfg. Co.* v. *Kane,* 258 U. S. 358, that a challenge of jurisdiction of the State court for want of due process over defendant *in per-*

sonam, to be interposed in that court, and, if overruled, followed by invoking the revisory jurisdiction of this court, the final judgment may be questioned collaterally, if in truth there be a want of due process, citing *Pennoyer* v. *Neff,* 95 U. S. 714.

But petitioner made a direct attack upon the void judgment of lunacy in the court wherein it was rendered pointing out many errors and asked that the judgment of lunacy be vacated and held for naught (R. 8-9, 85-89).

The lower court brushed aside petitioner's constitutional rights in its opinion and tried to justify the void proceedings by saying "I do not believe the constitutional provision has been violated, nor can just complaint be made of the lack of due process of law" (R. 97).

HOW KENTUCKY COURTS SAY PETITIONER VALIDATED THE VOID LUNACY PROCEEDING. .

The lower court held that petitioner by asking that another jury be impanelled to investigate her mental condition entered her general appearance retroactively to the void lunacy proceeding (R. 5-6, 97). At the time that was done petitioner did not know nor did her present counsel that the judgment was void. Nor could petitioner or her counsel know or have found out by asking the trial judge because he held in his opinion in substance that it was valid and dismissed the petition (R. 100).

Since the judgment was void and even though petitioner did have another jury pass upon her sanity, it seems to us to be a harsh rule of law and a gross injustice for the courts to say petitioner validated a void judgment by filing that petition seeking to be restored to her civil rights when, in truth and in fact, they hadn't even been taken away from her legally at the inquest in the first place.

Petitioner was, even then, directly attacking the effect of the adjudication of insanity.

Petitioner not only later made a direct attack upon the void judgment of lunacy, but also upon the so-called restoration proceeding on the theory that if she had not been legally adjudged insane, and the proceedings were void, that restoration proceeding was also void because it was based on the idea that petitioner had been legally adjudged insane.

Certainly, the statute authorizing restoration proceedings contemplated a valid judgment of lunacy (KRS 202.290). Because of that fact, we cannot believe that petitioner by asking to be restored when petitioner had never been legally declared insane, waived anything, or that petitioner thereby estopped herself from attacking the void judgment of lunacy, which judgment, in effect, admits no trial was had.

Under the circumstances, petitioner was held to have ratified the void judgment of lunacy, even though her every action since she was released on parole from Central State Hospital (asylum) thirteen days after conviction persistently was to remove the stigma of insanity against her.

It seems to be a queer quirk of justice to think that such can be so when there are so many illegal things that have been combined together by the court to make it appear that petitioner had due process, when she has never even had a trial or yet been given the opportunity to be heard in person or by counsel at a lunacy inquest before a court having jurisdiction of her person to hear the case.

It is strange, indeed, to us to see the lower court make a finding of fact at a hearing on motion to vacate the void judgment of lunacy and restoration as was done in the opinion of December 23, 1950, as to petitioner's sanity, as to the lack of a conspiracy on the part of the doctors who were improperly brought into the case by the respondent, as to the legal representation of the court-appointed attorney, etc., and when we see from the record (R. 5) that on July 5, 1949, petitioner was just one of the twenty-nine unfortunate victims allegedly tried and apparently convicted upon the two medical examiners' testimony, for which they received $87.00 each. Obviously, the court was biased and prejudiced against petitioner when he wrote that opinion.

Each trial could have been hardly more than an *ex parte* and mock proceeding as apparently was the petitioner's. The twenty-nine victims of these two doctors, among others, no doubt, went the same smooth and similar route to the Central State Hospital. Nothing short of keeping the defendants incommunicado without summons or notice served on friends or others, without the right to defend being afforded, and ap-

pointment of effective counsel could accomplish the trial of twenty-nine persons in one day.

We cannot help but bring to the Court's attention the fact that the lower court in its opinion of December 23, 1950, while giving lip service to petitioner's constitutional rights and claiming due process of law had been satisfied, made this startling admission and confession in regards to lunacy inquests:

> "If these insanity cases were tried with the same deliberation as civil cases are tried in the other branch of the Jefferson Circuit Court, it would probably take from two to three weeks to try them all, and yet they must be disposed of, because they come in a steady flow, sometimes as many as forty being tried in one day."

Are petitioner's constitutional rights of personal liberty of less importance than one civil trial? We think not.

Apparently, the lower court judging from what was said, would have tried one hundred cases in a day, if there had been that many on the docket. The court failed to say, however, that those twenty-nine who were tried, as is the custom, are accumulated for at least two weeks. The steady flow of "as many as forty being tried per day" is also an accumulation of cases, certainly not forty being tried every day or any day except once every two weeks, even though the innuendo is to the contrary.

SUMMARY.

Throughout this whole case beginning with petitioner's arrest on June 28, 1949, can be seen a persistent underlying effort to arrest, convict and commit petitioner to an asylum in any manner possible. She was arrested three times, no warrant being validly issued. There were no summons issued or served on any person upon whom the statute requires service. The "Notice," wholly insufficient to satisfy the requirements of the statutes, must have been served upon petitioner while she was asleep—no copy was left with her—nor was it served upon the Louisville General Hospital where petitioner was imprisoned. Even the record of the service of the "Notice" by M. Casper, as shown by the return, failed to show it was served and acknowledged until petitioner began her attack on the void lunacy proceeding. Even the Court of Appeals recognized the invalidity of the judgment, but only because the "Notice" had not been served upon the hospital, the custodian of petitioner, and not because the alleged service thereof by M. Casper on her was void. All other errors in the case were either bypassed or white-washed.

However that may be, and for whatever reasons there are, it is readily seen petitioner's constitutional rights were deliberately ignored when she was denied the right to attack the void judgment of lunacy on the highly technical theory of waiver and estoppel.

Due process of law in this case certainly demands a far greater consideration to a citizen of the United

States who had never before been arrested or incarcerated in her life, and who wasn't even charged with the commission of a crime at any time by her persecutors who were so willing to arrest, convict and commit her.

CONCLUSION.

In order that petitioner may free herself and posterity of the recorded judgment and public stigma of having been convicted of lunacy and to aid others who also may be similarly unjustly convicted in the future, this petition for a writ of certiorari should be granted.

Respectfully submitted,

VINCENT J. HARGADON,
ARNOLD J. LEMAIRE,
722 M. E. Taylor Bldg.,
Louisville 2, Ky.,
Counsel for Petitioner.

April 28, 1952.

The Appendix 1 and 2 and all references thereto follows this conclusion.

APPENDIX 1.

The opinion of the Honorable Lawrence F. Speckman, Chancellor, Jefferson Circuit Court, Chancery Branch, First Division, Louisville, Ky., was rendered in the case of *Cadden* v. *Cadden,* a divorce action instituted by Rose Cadden, petitioner herein. The opinion has not been reported.

The divorce proceeding is contemporaneous to petitioner's proceeding attacking the void judgment of lunacy. Much of the evidence is the same in both cases.

The Chancellor wrote his thirty-three-page opinion after careful deliberation. He heard much of the testimony orally, including that of petitioner. He personally observed her and her husband as well as others.

The opinion is presented here for the consideration of the Supreme Court, not as an authority, but as a correct presentation of the facts with the court's observations thereon. Much of the opinion deals with the testimony of psychiatrists and condemns much of the practices of her persecutors. He also condemns the practice of preventing petitioner from having due process of law in her lunacy inquest.

It should be observed that the chancellor's opinion was rendered about two months after the Court of Appeals of Kentucky handed down its decision in the case at bar. He had much more evidence before him than the Court of Appeals had and knew first hand many facts not in the record on appeal. We believe the Court of Appeals of Kentucky would have decided otherwise if it could have had the benefit of all of the same evidence.

The chancellor's opinion recognized the decision of the Court of Appeals and his opinion was written with full knowledge of its contents (App. 1, pp. 34-57).

Commonwealth of Kentucky, }
County of Jefferson } ss.

OFFICIAL CERTIFICATE.

John M. Hennessy, Clerk of Jefferson Circuit Court, in and for the Commonwealth and County aforesaid, do hereby certify that the attached is a full, true and correct copy of Opinion, filed in Action No. 319-620, styled, Rose Cadden, Plaintiff, vs. James J. Cadden, Defendant, as appears of record in my office.

(s) Lawrence F. Speckman, Judge.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court aforesaid, at the city of Louisville, this 7th day of February, 1952.

John M. Hennessy, Clerk.

No. 319,620

JEFFERSON CIRCUIT COURT
CHANCERY BRANCH
FIRST DIVISION

ROSE CADDEN, - - - - - - - - *Plaintiff,*

v.

JAMES J. CADDEN, - - - - - - - *Defendant.*

OPINION.

This case comes before the court on a motion of plaintiff to secure full custody of the parties' now twelve-year-old boy and also on a motion of the father, defendant herein, for an injunction restraining the plaintiff from inter-

fering with defendant's possession of the child. Both moves present the same issue, who is the most suitable parent to have full custody.

In order to satisfactorily decide that question, which it is unfortunate comes up at this stage of the proceedings, it is necessary to relate the history of this case as it appears from the record.

This litigation began on March 10, 1950, as an ordinary divorce action by the wife seeking an *a mensa et thoro* divorce from the defendant and the care, custody and control of her infant son, James J. Cadden, Jr., also alimony and adjudication of her rights in the real estate and personal property. On a rule issued by this Court on motion of the plaintiff to surrender to her custody of the child and alimony and maintenance for herself and child *pendente lite,* the defendant responded by charging the plaintiff to be insane and not the proper person to have the custody of the child, and the question of the mental fitness of the plaintiff was therefore injected into the case by the defendant.

It then appears that prior to the institution of this action plaintiff on July 5, 1949, had been adjudicated by this court, Criminal Division, a person of unsound mind at the instigation of the defendant and had been confined in the Central State Hospital, Lakeland, Kentucky, for a short time until notice was given plaintiff's relatives in Pittsburgh, Pennsylvania. At the suggestion of plaintiff's sister, Mrs. Hayden, plaintiff was released from Central State Hospital and later, in February of 1950, was legally restored to the status of a person of sound mind.

Being advised by four Doctors of Psychiatry in Pittsburgh and her spiritual advisor to return to Louisville and attempt a reconciliation with her husband, the plaintiff did so and found it impossible, and as defendant had had possession of their home and her child and refused to be reconciled to her she instituted this action for divorce against defendant, as aforesaid.

Shortly after this action was filed, to-wit on March 28th, defendant filed another petition in the Circuit Clerk's office, Criminal Branch, setting out that the plaintiff was a person of unsound mind and a lunatic and violent, and upon that petition caused a bench warrant to be issued and the plaintiff arrested while the plaintiff was preparing to attend a hearing before the Commissioner of this court on the rule which had been issued against the defendant. All of this appears in the affidavit filed herein by the defendant.

All of this happened while this case was pending in the Jefferson Circuit Court, Chancery Branch, Second Division, to which it had been properly assigned, and for some reason better known to the Judge of the Jefferson Circuit Court, Chancery Branch, Second Division, it was assigned to this division and it has been practiced and tried in this division since June 8, 1950.

The restraining order was issued on June 5, 1950, against the defendant from injuring the plaintiff or doing her bodily harm, or from instituting or causing to be instituted legal proceedings calling for an inquest into her sanity or from interfering with her in any manner whatsoever or not permitting her to enter in and live in the home at 2207 Edgehill Road until further orders of this Court. That order was made a temporary injunction on June 14, 1950.

On a response to the motion for temporary injunction the defendant, among other things, stated that at all times since the institution of the lunacy proceedings he had been guided and acted solely upon advice of competent doctors and attorneys and that the second action filed by the defendant against the plaintiff in the Criminal Branch of this court was filed on the advice of Dr. John D. Trawick and was dismissed on the advice of counsel, and that no other lunacy petitions have been filed; that seven local psychiatrists agree that the plaintiff is potentially dangerous to the defendant and his child; defendant would agree to pay $65.00 a month as alimony. Later, on June 20, 1950, the defendant petitioned for an injunction enjoining the plaintiff from visiting and molesting or interfering in any way

with the defendant or the child and from coming around or entering the premises at 2207 Edgehill Road, and for an order awarding the custody of the child and the possession of the property to the defendant, and as basis for same the defendant claimed that the plaintiff had committed the following acts in the month of June of 1949:

1. Attacked the child with a butcher knife without cause or provocation;

2. Attacked the child with the burning end of a cigarette without cause or provocation;

3. Threatened to kill the child without cause or provocation;

4. Threatened to kill the defendant without cause or provocation;

5. Urged the child to strike the defendant upon the head with a baseball bat for no cause or reason;

6. Called the defendant at his place of business and while using vile and abusive language against the defendant threatened to shoot the neighbors.

The petition for an injunction against the plaintiff was supported by the affidavits of Drs. Keller, Casper, Kasey and Kelly.

Proof was taken on August 23rd before the Court by the defendant in support of his motion and on motion of the defendant the Court examined the plaintiff and her son in chambers. The child in the examination maintained that his mother had attempted to attack him with a knife and had also struck him with a razor strap, all of which was denied in the presence of the child by Mrs. Cadden, Mr. Cadden not being present. As a result of that examination the Court ordered the child to be permitted to visit his mother on two afternoons a week, Mondays and Fridays, from 2:00 o'clock until 7:00 in the custody and in the presence of Mrs. A. E. Broderick who was agreed upon by the parties as a neutral and unbiased person and who had considerable experience in social work with the Catholic Charities of Louisville.

At the time of the hearing in chambers the mother had not seen her child or been in his company for more than fourteen months and he had been under the care and supervision and control of the father. Later Mrs. Broderick testified in the case and the Court, after reading her testimony and that of several other witnesses, decided it would be advisable to allow the plaintiff to have custody of the child every other week end and also continued the visits twice a week on Mondays and Fridays from 2:00 o'clock until 7:00 without the supervision of Mrs. Broderick. The motive in doing so was to test the plaintiff, mother of the child, as to the relations between her and the child. That relation has continued until the present moment with the exception that it was interrupted on advice of Mr. Henry J. Merritt, counsel for the defendant, who without notice to or advice from the Court advised the defendant, his client, not to permit the boy to continue the visits with his mother which had been ordered by the Court. This had continued for more than five weeks when the Court's attention was called to it by the attorney for the plaintiff, and the Court at the hearing, on the motion to suppress the testimony of the boy, made by the plaintiff, sternly reprimanded the counsel for the defendant, said Henry J. Merritt, for his action in advising the disobedience of the Court's order. The reason given for advising his client to disobey the order of the Court was that in view of the child's testimony against the mother he deemed it dangerous for the child to be in the presence of the mother. The Court then ordered that the child should be permitted to make up the eleven absences from the mother and continued the every other week stays with her, which has been continued up to date.

In the meantime the father had permitted the mortgage on his home to be foreclosed and the plaintiff was in danger of being put out; and her sister, Mrs. Hayden, purchased the home at the foreclosure sale for $17,200.00 and placed the plaintiff in possession thereof, where she is now residing. By his action in allowing the mortgage to be foreclosed, the defendant was himself ejected from the premises

and is now living in the Arcade Apartments which are located in the south central part of the city, west of Churchhill Downs, and the child is attending Our Mother of Sorrows Catholic School on Eastern Parkway, across from the St. Joseph Infirmary, near Preston Street, which requires transportation either by his father or by bus. While living with the mother on Edgehill Road, where the couple formerly resided and where the plaintiff is now living, the child was attending the St. Francis of Assisi Church on Bardstown Road and Alfresco Place, which is a much closer vicinity to his home if he were living with his mother than his present location where he is living with his father.

The Court entered an order on June 27, 1950, directing the defendant to pay the plaintiff the sum of $100.00 a month, which has been continued until this time.

No proof has been taken in the action by the defendant since June 6th, 1951, on its counterclaim. On January 29th, 1951, plaintiff filed an amended petition in which, after alleging certain expenses paid out by her and which she had contributed to the furnishing and maintenance of the household during her married life in the sum of $8,500.00, she renewed her prayer for a divorce from bed and board and for the custody and control of her child, and judgment in the amount of $10,835.00 against the defendant as reimbursement for her own personal funds, and $25,000.00 lump sum alimony. Defendant has made several efforts to have the alimony pendente lite discontinued, all of which have been overruled.

A temporary injunction was sustained against the defendant, restraining him from cashing in or borrowing or making any loan upon or interfering with his $10,000.00 Government insurance.

Plaintiff made a motion May 29th to have a copy of the depositions of four doctors of Pittsburgh which were taken on behalf of the plaintiff in Pittsburgh in support of a lunacy petition against her in Jefferson County and as the depositions were not taken in the instant case the motion was overruled.

Orders were taken on June 1, 1951, to take the testimony of Dr. Louis M. Foltz and Dr. Arthur M. Kasey, both of Louisville, Kentucky, to be read as evidence in behalf of defendant in this action, and order was entered on June 5, 1951, requiring that the plaintiff submit herself for examination before Dr. Spafford Ackerly and Norbert T. Kende. The report of Drs. Ackerly and Kende has been filed. In that report they state that they interviewed Mrs. Cadden on June 15th from 4:30 to 5:22, which would be a total of fifty-two minutes, and discussed the case between themselves, including one-half hour's dictation of this report, making a total of two and one-half hours. They stated that they would see her again after their vacation, if possible. They state that they saw her again on September 13, 1951, and in the second interview she was quite similar in every way as in the first interview. Their final conclusion was:

> "As Psychiatrists we are in agreement that we are dealing here with a person who is a paranoid personality. Just where a paranoid personality ends and mental illness sets in is so often a practical matter of how much tolerance is shown by the relatives or the public. We might come closer to an estimate of this if we were to interview relatives, friends and acquaintances on both sides. However, we venture to say we could not state that the influence of the mother on the child would be better or worse than the influence of the father whom we do not know and have never interviewed. If the Court wishes we will be glad to interview the husband with this in mind."

No effort has been made to have them testify and submit to cross-examination, except shortly before this hearing, on November 23rd, counsel for defendant claims they had an appointment with the Commissioner to take their testimony but due to the absence from the city of Dr. Ackerly they were unable to complete the appointment.

The case now comes before the Court on a motion of the plaintiff for complete custody of the child pendente lite,

and further moves the Court to award her a reasonable amount for maintenance of the child pendente lite.

The defendant moved to obtain a restraining order against the plaintiff from visiting, being with, conversing with, molesting or annoying in any way the defendant or his son, James J. Cadden, Jr., until a final decision of this Court. The plaintiff moves to strike the defendant's motion for a restraining order because the defendant failed to comply with the provisions of the Civil Code of Practice:

(1) Did not give notice of the application.

(2) The application is not supported by affidavit setting forth the facts showing that irreparable injury will result to the applicant from the delay of giving notice. The defendant has filed his affidavit which goes over all of the testimony of the psychiatrists, which is in the record. He further states that on June 15, 1951, the Court of Appeals in the case of Cadden v. Commonwealth, 242 S. W. 2d 409, affirmed the lunacy judgment in the Jefferson Circuit Court. An examination of the opinion in that case does not sustain the contention of the defendant as the Court merely held that the action of the plaintiff in seeking a restoration of her alleged lunacy judgment estopped her from attacking the judgment.

The Court desires also to call attention to another false statement made by the defendant in his affidavit which was presented to the Court in which the affiant Cadden stated under oath that after the Court had ordered that the child resume its visits to the mother, as contained in the former order which had been suspended by order of counsel for defendant previously, that he had called at the home of the Judge on Saturday afternoon to tell the Court that his son had refused to resume his visits to his mother at her home because of his fear that harm would come to him, and that the boy was out in the machine in front of the Judge's home and was unwilling to resume the visits, and that the Judge replied to tell the boy that he must resume the visits or he would call up Mr. Hargadon, counsel for the plaintiff, who

would compel him to do so. On the Court's insistence that such statement was not true the affiant reluctantly, under advice of counsel, rewrote the affidavit so that it contained the following:

> "Affiant then took the child to the Judge of this Court and related the above facts to him. The Judge refused to modify his order and stated to the affiant that the boy would have to obey the order of the Court. If he did not, an officer would compel him to do so."

The above quotation was finally included in the affidavit in place of that proposed by the affiant, and is exactly what happened.

If the above recital is a sample of the arguments and misstatements of facts contained in the affidavit of defendant, his testimony is hardly worthy of belief, and the Court is not impressed by it. Neither is the Court impressed by the testimony of psychiatrists offered by the defendant for the reason they have not given the plaintiff as thorough an examination as that given by Dr. Crice and Dr. Render. Dr. Crice was given a very thorough cross-examination by counsel for the defendant and they were unable to shake his belief that the plaintiff is the proper and fit person to have the custody of her child, whereas, on the contrary, with the exception of Drs. Ackerly and Kende, who state:

> "We could not state that the influence of the mother on the child would be better or worse than the influence of the father whom we do not know and have never interviewed. If the Court wishes we will be glad to interview the husband with this in mind."

The Court has the same criticism of the testimony of Dr. Louis M. Foltz. For instance, after detailing the formula that is used by psychiatrists in arriving at a condition which he describes as a rather standard procedure used by all psychiatrists in their program of examination, he states, page 107:

"* * * but you first start out by testing the patient's general attitude and demeanor, how he reacts to the examiner and the examination, how he walks in and how he meets the person, what his attitude is toward the situation, and so forth. The next thing is you test the patient's memory and ability in thinking, his ideation we call it, test that by asking questions that are set down as standard procedures as well. The next is to test the judgment. The judgment is tested again by giving the individual patient certain factors as laid down in certain little situations and letting the patient arrive at some conclusion. Then the insight of the patient in regard to his own feeling, his own attitude about himself. Then the individual's stream of thought, how it goes along, how it functions, his mental activity in general, how it follows along and formulates ideas. Then we have questions in relation to the specific case at hand that are formulated sort of on the spot in terms that are couched to that particular case to determine the patient's condition. These are not standard at all. They are things that we work out by our training and experience in dealing with patients. Each personality will operate differently."

That in brief, gives you the pattern which was followed by all the psychiatrists offered by the defendant and in accordance with the statement made by Drs. Ackerly and Kende. In answer to the question how much time they took to interview a patient, he answered to question 44, page 809:

"This will vary considerably and it would be a hard thing to draw up an average, but it will run anywheres from ten minutes to several hours and that will vary considerably depending upon the case."

When we analyze the reasons given by Drs. Kasey and Foltz, Ackerly and Kende, we find from their interviews that Mrs. Cadden had a markedly suspicious attitude and ideas. It is well described by Dr. Foltz on pages 798 and 799 of his testimony when he was asked these questions and gave these answers:

"16. What conduct is normally the result when a person suffers from schizophrenia, paranoid type?

A. Well, the basis for the paranoid state in schizophrenia is the projection of ideas that the individual has within himself onto others. That's the basic principle. Now the result of that, the result of that projection can ramify in many, many areas and it goes all the way from feeling that people are against you or against the individual to feeling that they are going to kill them, and everything in between, feel that they are doing things against them, uncooperative, and anything you could imagine between the stage where the individual would be uncooperative with you or towards the patient to a feeling that people are going to kill the patient himself.

17. Does that mean that they are apt to have feelings of hostility toward other people?

A. Yes, that's one of the essences of the paranoid state, that the hostility is felt within the individual, the patient himself.

18. Towards someone else?

A. Towards somebody else.

19. Does that situation or that feeling on the patient's part come about regardless of the—or can it come about regardless of the conduct of the person to whom this hostility is directed?

A. Yes. Regardless of what the other individual's attitude might be the feeling are within the patient himself and his attitudes toward the other person are going to present themselves regardless of the other person's attitude, whether it is one—whether the individual shows any sort of interest even in the patient?

20. Do people suffering from this disease frequently resort to violence?

A. Adjectives like frequently are very difficult to decide on.

21. Let me state it this way. Do people suffering from this disease upon occasion without warning and without apparent reason do violence to either themselves or to others?

A. A patient who is mentally sick with schizophrenia, paranoid type of illness is potentially dangerous to other people as well as to themselves. Can we put it that way?"

Further amplifying was given by Dr. Foltz on page 802, questions 27 through 29:

"27. Are people suffering from this disease apt to perpetrate untruths?

A. Well, to the patient they are certainly not untruths; to the patient they are real. They get out of contact with reality and the patient feels that—for instance, that people are against them. Then if you permit that premise as being a fact, then, of course, you do not have any untruths any more, but the patient starts out with the false premise, of course, that the people are against them, are going to hurt them, and so forth, and then from then on they try to protect themselves and try to work out some means of defense because they have assumed that people are against them. That appears as untruths to us, but to the patient it is real.

28. Then by this method they try to convince others of the truth of what they believe even though what they believe is wrong, is that—

A. Yes. That's the mechanism of defense that the human organism has, trying to protect itself from others' opinions and attitudes and trying to prevent harm to himself as he feels in his mis-interpretation of fact.

29. Doctor, if Mrs. Cadden reached a point where she made an attack upon her child with a butcher knife merely because the child had what Mrs. Cadden thought made a mistake in his studies which he was doing at the time in the kitchen, and that she from all appearances seriously intended to carry though this attack before she was interrupted, would you say that she had reached a dangerous or critical stage?

A. Well, yes, certainly, I think she had reached a dangerous stage of the illness. I think even anybody would assume that, I think."

The above clearly indicates that Dr. Foltz is of the opinion that Mrs. Cadden is suffering from schizophrenia, paranoid type, and as a result she has a feeling that people are against her and are doing things against her, and she has a feeling of hostility toward other people which controls her actions, and therefore she is potentially dangerous

to other forms and may lie dormant for years until the individual gets into difficulty or it may be a constant factor where the individual is constantly expressing his hostility and may cause other people harm, and it was their opinion that her paranoid state had gone so long it would be a very difficult case to treat and the outcome would be questionable.

He further stated that frequent association with a paranoid schizophrenia patient is evidence that the effect would be that the child would adopt some of these suspicious attitudes that the parent shows; further that the patient suffering from such a disease is apt to perpetrate untruths to get out of contact with reality and the patient feels, for instance, that people are against them when they are not; and his premise is that the patient starts out with a false premise that people are against them, are going to hurt them, and so forth, and from then on they try to protect themselves and try to work out some means of defense because they have assumed that people are against them, all of which appears as untruths to others but to the patient it is real.

Then they put before the doctors this question, as for example to Dr. Foltz, page 803, question 29:

> "Doctor, if Mrs. Cadden reached a point where she made an attack upon her child with a butcher knife merely because the child had made a mistake in his studies which he was doing at the time in the kitchen, and that she from all appearances seriously intended to carry through this attack before she was interrupted, would you say that she had reached a dangerous or critical stage?
>
> A. Well, yes, certainly. I think she had reached a dangerous stage of the illness. I think even anybody would assume that, I think."

Dr. Henninger's testimony given in response to interrogatories in Pittsburgh is to the same effect as that of Drs. Foltz and Kasey, and Dr. Henninger used the same tactics used by all of the doctors for the defendant. He had written to the authorities at Central State Hospital between

his two interviews and obtained from them a report as to the circumstances of Mrs. Cadden into their hospital, and although he states, "I cannot feel in my mind that I was at all influenced by their opinion, and I am certain in my own mind of my conclusions, based upon my observation," the Court has no quarrel with these psychiatrists in their conclusions but believes they are based upon the wrong premise.

Without going further into the testimony of the defendant's witnesses, all psychiatrists, we will now devote some time to the testimony of the witnesses for the plaintiff. First, the psychiatrist, Dr. Thomas J. Crice, testified on direct examination and proved his qualifications on page 276, which reveals that he is well qualified from actual practice to express an opinion upon the mental capacity of a patient, having been engaged in that practice ever since 1909. He has been associated with the Criminal Division of the Jefferson Circuit Court in the Lunacy Department for thirteen years, specializing in psychiatry, and has been engaged in the general practice of nervous and mental diseases for about fifteen years.

He examined Mrs. Cadden in the latter part of January, 1950, at the request of her attorney, and later in February, 1950, he called in Dr. W. E. Render as a consultant. In February of 1950 he made four examinations in company with Dr. Render and on the 14th of February, 1950, he examined her in the office of Dr. Kende under anaesthesia which is known as pentothal which is called mental sleep. They found no mental disorder, and he further testified in the Criminal Branch of this court, on February 21, 1950, at the time she was restored, and later when she had been arrested at the instigation of the defendant he examined her in the County Jail on March 29, 1950. His method in endeavoring to make a correct diagnosis of the patient is to interrogate her in such a way that she is not able to conceal the things that she may be able to conceal to the ordinary layman, and that is through the injection of

sodium pentothal, for the conscious mind is temporarily subsided and the patient is unable to conceal any conscious thought that is in his mind and they compared the examamination that was made of the subconscious mind with the examination made of the conscious mind and they found in their examination there was no difference in the examination of Mrs. Cadden's mind under pentothal than there was without pentothal; practically the same reactions were observed. This pentothal is known as a truth serum and is used to test the veracity of a witness or criminal.

He further testified that he had examined Mrs. Rose Cadden many times subsequent to March 9th, at most times when Dr. Render was present, and in answer to question 26, page 282, as to Mrs. Cadden's physical and mental ability to have care, custody and control of her child, he stated as follows:

> "26. Now, Doctor, from your examinations of Mrs. Cadden from the very beginning and from your observations that you had of her from time to time, I would like for you to state to the Court whether or not she is a physically and mentally capable person to have care, custody and control of her child.
> A. Yes."

He further testified in the course of his examination he did not discover any degree of paranoia in Mrs. Cadden or any mental disorder of any character. She related a great many of her domestic troubles to the doctors and the sum and substance of the talks that she made to them was her domestic difficulties and arguments over her boy with her husband caused by the drinking episodes of her husband from time to time and the disturbance and dislocation of his business. He was asked specifically as to the truth or falsity of the statement that she made to him and he answered he never thought Mrs. Cadden was an untruthful woman at any time. He was asked, page 285, question 38:

"What caused you to believe that?

A. Her matter of fact answering my questions, her behavior, her general mannerisms and her effort to try and tell the truth to the best of her ability."

These questions and answers were given on cross-examination which was, in the course of it, very severe. Such facts as he described as he found them pertaining to Mrs. Cadden brought out these questions, page 285:

"43. Now such facts as that are not foreign to paranoia, are they, Doctor?

A. Well, you are stepping out into pretty deep water. I am beginning to think as the years go by that true paranoia is somewhat of a misnomer. Paranoia occurs as a trailer to various kinds of mental trouble, namely, schizophrenia, manic-depressive insanity. It has been seen in various stages of paresis of the brain. The old term true paranoid is a question in the minds of many writers on the subject of mental disease. It seems paranoia has been used, or rather, abused. It can be used in season and out of season. It can be used in February very conveniently and it can be laid aside in July. The point I am trying to make is there must have been a mental disease in the mind of the patient or a paranoiac episode wouldn't occur.

44. Now paranoiac episodes are not continuous in their occurrence, are they, Doctor?

A. If one knows how to interrogate them, yes. They have ideas of persecution as we all know without any foundation, they are inconsistent in their beliefs, they will invariably say one thing in one minute and reverse themselves the next minute. The argument is so thin and so erratic that it isn't difficult, I don't think, if one takes the time and patience, to discover a paranoid mind.

45. You feel that other doctors might disagree with you on the point that paranoia—

A. Of course, that's their privilege.

46. —isn't a continuously occurrent disorder, and you answer, that's their privilege.

A. I believe I answered that question. Paranoid —once a paranoid they are always a paranoid, they don't get well."

She, according to Dr. Crice, did not betray or disclose any of the traits of the true paranoid. Page 289, question 59:

> "Now thus far you have given me nothing but her conclusions. What facts, what incidents, episodes, did she relate to you by way of an explanation of these things?
>
> A. She did not get off into a paranoid trend, paranoid accusation and a paranoid abuse, an illusion. She was very reasonable in her belief and grief."

As to her truthfulness, page 298, he was asked this question and made the following answer:

> "91. Did she tell you she had attacked her child with a butcher knife?
>
> A. I asked that specific question. She denied it every time, with pentothal and without pentothal."

Counsel for defendant further tried to trip the Doctor on the question of her false statements, as evidence that she was a paranoid, page 302:

> "113. Had they been false that would have been evidence of paranoia, wouldn't it?
>
> A. No.
>
> 114. It would not?
>
> A. No. Every time a person tells a falsity that isn't evidence that he has paranoid disease, now or no other time.
>
> 115. How many falsehoods does it take—
>
> A. Paranoia is not a condition built upon falsehoods; it is built upon disease.
>
> 116. Perhaps the falsehoods result from the disease.
>
> A. No. The falsehoods in paranoia are true concepts of the patient, a disease that has occurred prior to this paranoid condition, a diseased mind that has contributed to paranoiac manifestations as we see them. Paranoia *per se* has quite an implication, quite a background, and it don't exist by itself."

He further said that if all the things were true about her conduct in her relations with her husband and his family,

he would regard it as abnormal conduct but not insanity and not symptomatic of some stage of paranoia.

In support of Drs. Crice and Render we also have the testimony of Dr. McIntyre, of Cincinnati, whose deposition was taken with both parties represented and given the advantage of personal cross-examination. It is obvious from the cross-examinations of Drs. Crice and McIntyre, both of which were rather severe, that counsel for the defendant was attempting to elicit answers to hypothetical questions based upon what Mrs. Cadden told them about her domestic difficulties, and the answers in each case were typical:

> "Q. Did she criticize Dr. Cadden for not having sent her husband any real estate business?
>
> A. No, but she did say that his family had—no, I will put it this way—she did say she thought his family hadn't furthered him in his business, to the extent of which they might—that's what her husband thought.
>
> Q. Did she tell you the Cadden family lacked religion?
>
> A. No, —of course, what that would have to do with insanity is rather remote, because a lot of people say that about other people, that has no bearing on insanity, they don't go to church or they don't have any religion."

The plaintiff had been examined by four doctors in Pittsburgh, all of whose depositions were taken in the second lunacy case in this court and were evidently favorable to the plaintiff's case. However, as they were not depositions taken to be used in this action, the Court overruled the plaintiff's motion to have them read in this action. They were the depositions of Drs. Rau, Mitchell, Srodes and Malcolm, all of Pittsburg, Pennsylvania, and the Court has not had the benefit of the detail of their testimony.

In addition to the psychiatrists who testified for the plaintiff we have the testimony of Mrs. A. E. Broderick. The Court remembers distinctly the circumstances under

which Mrs. Broderick was injected into this case, as we have previously recited in this opinion. She was selected because of her experience in working with the Catholic Charities in the City of Louisville as a volunteer worker for ten years, chiefly, as she expressed it, in broken homes. She is not a paid worker but has given her services voluntarily. She is also a mother, having reared two children, and been in business for more than twenty years prior to her entry in this benevolent work. She was selected on the commendations of Father Lammers of the Catholic Diocese who has charge of the family service troubles arising within the Catholic Church. She was selected by the Court on the recommendation of both parties in this case to be with Jimmy the boy involved in this case, while he was with his mother on Monday and Friday afternoons, and she is an absolutely neutral witness who possesses a great deal of common sense gained by practical experience in cases of this kind. Her testimony must bear great weight with the Court in deciding between the contradictory testimony of the psychiatrists. She was placed in this case as a trial of the mental capacity of the plaintiff and a means of obtaining the real truth as to her mental condition.

A perusal of her testimony convinces the Court that when you have to decide between the testimony of experts upon a particular question which is apparently contradictory, the best reliance is upon the practical realities of the situation in what has actually occurred. After spending several months as a neutral observer she testified on cross-examination, pages 598 and 599:

> "32. * * * Do you think that your presence or the presence of anyone is necessary with Mrs. Cadden and her child being in that home?
>
> A. I do not."

She is quite sure of her qualifications to testify in the case when she was asked this question, page 601:

"39. Have you received any degrees in psychiatry?
A. No.
40. Or in psychology?
A. No. May I answer that? I would say thirty years in the business world and ten years in social work would be equal—which my organization and every other organization in Louisville say is equal to any degree you would have."

She also answered that she did not discuss Mrs. Cadden's previous history while she was there, she went there to observe her conduct and her relations and Jimmy's relation to her. The reason she assigned for deeming it unnecessary for anyone to be with Jimmy and his mother is based upon her observation of the two in their home and their relations. She found them very happy, he played games with her and had dinner with them and their conduct was absolutely normal in every respect. When he got ready to go home in the evening he was always nervous and jittery and didn't know what to do. He also denied that his mother had ever chased him with a butcher knife and that question was not put to him by Mrs. Broderick, but she overheard a conversation between Mrs. Cadden and her son on the occasion of her first visit. That is expressed in her deposition in answer to questions 11 through 15, page 355:

"11. Now Mrs. Broderick, I would like to tell the Court what conversation you heard that took place between Mrs. Cadden and her son on the occasions of your first visit with respect to Mrs. Cadden asking her son if she had ever chased him with a knife.
A. Yes. I did not follow them from room to room. I could hear everything that went on in the house. Mrs. Cadden asked her son if she ever chased him with a butcher knife and he said, 'No, Mother, you did not.'
12. Were you in the same room at the time or in an adjoining room?
A. I was in the living room and they were in the dining room, just an opening between the two rooms.

13. Did you hear clearly what was said?
A. I did.
14. You heard the little boy say that his mother did not chase him?
A. I heard the question distinctly and I also heard the answer.
15. Were you participating in that conversation at any time?
A. No, not that."

She also said on page 593:

"15. State whether or not you observed physical affection of the mother towards the child and the child towards the mother.
A. Yes. She is very fond of him. He comes in and throws his arms around her and kisses her. When he leaves in the evening he is reluctant to leave."

When we analyze the testimony of the psychiatrists for the defendant we find that they are largely based upon the statements made by the plaintiff that she was being persecuted. When we study the history of this case as attempted to be revealed in this opinion we find there is great justification for her belief that she is being persecuted. We find that before this action was begun she had been arrested as a lunatic and confined and tried without the benefit of counsel of her own choosing, possibly any counsel at all, and convicted in the Criminal Court on a lunacy charge and committed to Central State Hospital. That happened on the morning of June 28, 1949. She had had some difficulty with her husband a short time before over his fondling a little girl neighbor and on that morning, June 28th, after he went to work and while she was going about the house cleaning it up and at about 11:00 o'clock in the morning the doorbell rang and two policemen came in and arrested her on a lunacy warrant. They took her to the basement of the hospital, presumably the General Hospital, and locked her up in the Observation Ward. She was confined twenty-three days in the hospital

and her husband came to see her only once, on the 4th of July. Without any appearance or benefit of counsel in court she was sent to Central State Hospital upon the testimony of Drs. Keller and Ouerbach, and possibly Dr. Ackerly. That was the first persecution.

In order to be released it was necessary for her to obtain testimony of her friends and relatives who agreed to take care of her if she was released. She was then judicially restored, and after that she was again arrested sometime around the first of October, 1949, while at the Kentucky Hotel with her sister at 1:00 o'clock in the morning on another lunacy warrant, when they took her to jail and put her in another psychopathic section. At that time she sought counsel and no trial was ever had on that lunacy warrant. She was released on parole to her counsel. After spending a few days here plaintiff went back to Pittsburgh. That was the end of the second persecution.

The third persecution took place after she had filed her petition in this case, after she had been restored by judgment of the Criminal Court. On March 29, 1950, she was again arrested on a lunacy warrant taken out by the defendant as she was about to give her deposition in the Commissioner's office on a rule that she had taken out for alimony and maintenance for the child. This happened on the morning of March 29th. She was again placed in the psychopathic section of the jail where she was until 4:00 o'clock in the afternoon on that date. After the second petition had been filed to have her adjudged insane then the depositions herein mentioned were taken in Pittsburgh for her to be used in the trial of the second lunacy inquest. That trial was to be held on June 5, 1950. The charges were dropped by the defendant and the case was dismissed a short time before the trial.

In no case of the three arrests did she have any advance notice that she was to be arrested but was taken by surprise in a summary manner without the benefit of any advice of counsel or chance to protect herself.

Much has been said about the emotions and unstable condition of the plaintiff in her statements before the doctors and appearances in court. The Court takes judicial notice of the fact that this lady has been under a very severe strain, enough to upset the stability of an ordinary person, and in spite of all of that she has conducted herself in such a manner under such provocation as deserves commendation and credit instead of abuse and discredit.

The Court is not satisfied with the way this case has been practiced by counsel for the defendant or with the testimony of the defendant, for the reason it is evident from the testimony of Mrs. Broderick, a neutral witness, backed up by plaintiff, that the plaintiff's attempt to kill her son was deliberately hatched and prepared by the defendant for the purpose of bolstering his claim that the plaintiff was not the fit and proper person to have the custody of her child. The testimony of the boy himself, taken in chief, convinces the Court that he had been carefully coached to testify. An examination of that testimony shows that he was taken to the home of counsel for the defendant on several occasions before he was called in to testify and also to relatives of the defendant, and the complete control of him by the defendant during the period prior to his testimony, and the testimony of Mrs. Broderick showing his rehearsal of court scenes while at the home of his mother (and we have no reason to doubt Mrs. Broderick's testimony as a neutral witness) convinces this Court that neither the defendant's nor the boy's testimony in this case is worthy of belief. This conclusion, coupled with the evident fact of persecution which has been so clearly demonstrated in this case as to be beyond belief, convinces the Court after full personal knowledge of all that has happened in this case since it has been under supervision of this Court and from his own personal contact and observation of the witnesses, both plaintiff and defendant and the boy, although the Court has been warned by counsel for the defendant in his last argument before the Court that

this Court has been aware of that responsibility without being reminded and threatened by counsel for the defendant and accepts that responsibility, that it is for the best interest of the child to have the custody and control of Jimmy taken entirely from the defendant and placed with his mother, who has a suitable home, the home in which the child was reared for some years prior to this litigation and where he will be able to attend the same school that he attended while living in that home at 2207 Edgehill Road, which home was taken from him and his mother by the father permitting foreclosure proceedings to be instituted and the property sold; and only restored to the plaintiff, mother of the child, by the help and assistance of Mrs. Hayden, sister of the plaintiff, and through no help or assistance of the defendant; rather, on the contrary, through his neglect and ingenuity both mother and child were in danger of being ejected from their home.

Let the order be that the plaintiff be given full and complete custody of her son, James J. Cadden, Jr., before it is too late for him to be trained and reared under proper surroundings, with the right of the father to visit and be wtih him at times arranged satisfactory to the plaintiff; that the defendant be ordered to pay $150.00 per month for their maintenance pending a final decision in this case.

This order to take effect beginning Monday, December 3, 1951.

(s) Lawrence F. Speckman,
Judge.

December 1, 1951.
(Seal)

APPENDIX II.

The following affidavit of Gordon Kinsey, the court-appointed attorney to represent and protect the interests of the petitioner at her inquest of lunacy, shows conclusively that he was merely appointed, but did nothing on behalf of the petitioner which could even be called legal representation. It was in name only and certainly not effective representation as required by due process.

This affidavit supplements a former affidavit contained in Gordon Kinsey's Response to Rule (R. 12-13).

County of Jefferson }
State of Kentucky }

AFFIDAVIT.

The affiant, Gordon Kinsey, Attorney at Law, Louisville, Kentucky, after being duly sworn states as follows:

That on May 26, 1950, he executed an affidavit concerning his appointment as attorney for Rose Cadden at a lunacy inquest held in the Jefferson Circuit Court, Criminal Branch, Louisville, Kentucky, wherein he stated he had no recollection or office record of the appointment. Affiant now desires to supplement his previous affidavit and says positively that he never went to the Louisville General Hospital, Louisville, Ky., to see or consult with Rose Cadden about her case between June 28, 1949, and July 5, 1949, or at any other time, concerning which inquest of lunacy the record shows was held against her in said court on July 5, 1949. Affiant further states that so far as he knows he has never seen Rose Cadden in his life.

Dated this 19th day of February, 1952.

Gordon Kinsey.

Subscribed and sworn before me by Gordon Kinsey at Louisville, Ky., this 19th day of February 1952.

Wilson K. Beatty,
Notary Public, Jefferson
County, Ky.

(Notarial Seal)
My Comm. Exp. Oct. 21, 1954.

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CHARLES ELMORE CROPLEY
CLERK

No. 624

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

ROSE CADDEN, Petitioner

vs.

COMMONWEALTH OF KENTUCKY, Respondent

BRIEF FOR RESPONDENT IN OPPOSITION.

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Commonwealth of Kentucky

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Commonwealth of Kentucky

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ROBERTS PRINTING CO., FRANKFORT, KY.

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ROSE CADDEN, Petitioner

vs.

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BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT OF FACTS.

1. Inquest

On July 5, 1949, the Jefferson Circuit Court, Criminal Branch, conducted an inquest into the sanity of petitioner, Rose Cadden (hereinafter called Mrs. Cadden). Trial was by jury. Testimony was given by two Court-appointed doctors to the effect that Mrs. Cadden was suffering from paranoia, that she was violent and dangerous, would require hospitalization and that it was not in her best interest to require her attendance at the inquest. These two doctors had personally examined Mrs. Cadden within three days prior to the trial.

No stenographic record of testimony was made, but affidavits of witnesses and participating persons were later filed when the ensuing judgment was attacked.

A verdict of "unsound mind and a lunatic" was rendered and judgment was entered accordingly.

This action in Kentucky is statutory in nature and substantial, rather than strict, compliance to the statute was had. The statutory departure receiving the most emphasis later was that Mrs. Cadden had been notified of the pendency of the inquest by a "notice" instead of a "summons" as required by KRS 202.060.

Mrs. Cadden was committed to Central State Hospital, Lakeland, Kentucky, a public institution for the insane.

2. Mental Condition

Though not controlling on matters of certiorari, it should be noted that Mrs. Cadden was insane.

At the time of her commitment, Mrs. Cadden was a patient at the Louisville General Hospital, whose official diagnosis following an examination was "Paranoid Condition—considered potentially dangerous."[1]

While a patient at Central State Hospital, Mrs. Cadden was again thoroughly examined and it was the unanimous opinion of eight staff psychiatrists that she suffered "Dementia Praecox—Paranoid Type."[2]

3. Restoration

On February 21, 1950, while on parole from Central State Hospital Mrs. Cadden petitioned the Jefferson Circuit Court for restoration of her rights. No notice

[1] Report of Louisville General Hospital to Central State Hospital.
[2] Record, Central State Hospital.

was given to that hospital or to the Commonwealth, nor did either have knowledge of such petition.

The body of the petition is as follows:[3]

> "Comes Rose Cadden, petitioner herein, and states that on the 5th day of July, 1949, she was, in the Jefferson Circuit Court, Criminal Division, declared a person of unsound mind and a lunatic as appears of record in Lunacy Book # 67, page 187, of said Court. Subsequent to said adjudication, she was sent to the Central State Hospital for treatment and was parolled from said institution on July 20th, 1949.
>
> "Petitioner states that she believes she has fully recovered from any mental disorder, if any she had, and is fully capable of managing her own estate and prays the Court that a jury be empanelled to pass upon her present mental condition and for all proper orders."

The petition was granted.

4. Petition To Vacate Judgment In Trial Court

On May 23, 1950, Mrs. Cadden filed in the same Court a "Petition and Motion to Vacate Judgment of Insanity and Restoration", claiming the same to be a "clerical misprision and void."[4] This petition was amended and supplemented on November 22, 1950, bringing the grounds of attack against the lunacy judgment to a total of fifteen.[5]

Paragraph 14 thereof stated as follows:[6]

> "The record of this case shows conclusively that the defendant was not permitted to be in

[3] T. 7.
[4] T. 8.
[5] T. 85.
[6] T. 88.

> Court at her own inquest and the record is also silent as to why her personal appearance at the trial should have been dispensed with in violation of the constitutions of the State of Kentucky and the United States of America, and KRS 202.130."

This allegation was never referred to or pressed upon either the Trial Court of the Court of Appeals. It was abandoned. It is the only allegation of violation of the constitution that appears in the record.

- - - - - - - - -

Mrs. Cadden's contentions were simply that as the statute had not been complied with, the judgment was void. The constitutionality of the statute was never in dispute. No federal question was set up or decided.

The Commonwealth replied that even though the statute had not been complied with, Mrs. Cadden, by entering her appearance in her petition for restoration, had waived jurisdictional defects.

The Trial Court adopted the Commonwealth's argument and refused to vacate the judgment. Mrs. Cadden appealed.

5. Appeal to Court of Appeals.

The Court of Appeals heard the appeal upon the exact record made up in the Trial Court. This record was not analyzed by the Appellant (Mrs. Cadden) by bill of exception or any other device. The same argument was presented. Again no federal or constitutional question was specially set up or decided, nor was any drawn into issue.

The Court of Appeals affirmed and reasoned that Mrs. Cadden, by petitioning the Jefferson Circuit Court for a restoration, had re-opened the inquest

proceedings and had thereby "waived the jurisdictional question and estopped herself from saying she was never a party in court.'" The decision was based entirely upon adequate and proper State law.

6. Petition for Re-Hearing

In its written opinion, the Court of Appeals stated, 242 S. W. (2d) 413, "Therefore the judgment was void."

Mrs. Cadden petitioned for a re-hearing, contending:[8]

1. Void judgments cannot be validated by subsequent proceedings.
2. Restoration proceedings not part of original lunacy inquest.
3. Validation of void lunacy judgment deprived Mrs. Cadden of constitutional rights of trial by jury.

As Mrs. Cadden had received a trial by jury, and as contentions 1 and 2 had been decided and treated in its opinion, the Court of Appeals neither entertained nor decided any of these contentions and did not disturb its previous judgment.

ARGUMENT.

1. Certiorari Not Proper As No Federal Question Set Up Or Decided In Any Kentucky Court.

The foregoing review of proceedings clearly shows that no federal question was at any time specially set up or decided in any court below. The question in the

[7] See full quotation ante p. 6-7.
[8] Headnotes from Mrs. Cadden's brief on re-hearing.

case was purely one of local law and the decision thereon rests firmly upon well-known law.

The Court of Appeals recognized the issue, stating: (242 S. W. (2d) 411)

> "The substance of the grounds alleged are that Mrs. Cadden was not before the Court (because notice, not summons, served) and no judgment was entered in the order book." (Insert Supplied.

Its reasoning is clearly stated at 242 S. W. (2d) 414 and 415:

> "There is specific authority for the concept, above impliedly recognized in Upton's Committee v. Bush, supra, 135 Ky. 192, 121 S. W. 1005, that a proceeding for judicial restoration to competency is but a continuation of the original proceeding and that when further action is taken in which it is represented that a judgment of insanity exists and the court is asked to take hold of the case again and further pass upon the party's rights, the question or original jurisdiction is waived and the restoration proceeding precludes the party from going back and attacking the original judgment. In re Bishop's Conservatorship (Bishop v. Welch, 149 Ill. App. 491; Moats v. Moore, 199 Ill. App. 270; Cornett v. Cornett, 122 Mich. 685, 81 N. W. 920, Jorgensen v. Winter, 69 Wash. 573, 125 P. 957; Pope v. Bolin, 244 Ala. 322, 140 So. 382; State ex. rel. Bartlett v. Litrell, 325 Mo. 35, 26 S. W. (2d) 327, 121 A. L. R. 1506; 44 C. J. S., Insane Persons, § 55.
>
> "We think the motion by this petitioner to reopen the inquest, thereby invoking the action of the court for her benefit (the result being a judgment that she was then of sound mind) was the recognition by her as a person compos mentis that she had been legally adjudged insane. She did not

> then question the validity of that judgment as she might more consistently have done. She thereby waived the jurisdictional question, and estopped herself from saying she was never a party in court.
>
> "The judgment is affirmed."

Such was the entire scope of this appeal, and the decision thereof rests squarely upon adequate law.

The use of the word "void" instead of the word "voidable" in the sentence quoted before "Therefore the judgment is void" appears to have given rise to the petition for re-hearing as well as this petition for certiorari.

Although use of the word "voidable" might be more in conformity with the well-understood principle that voidable judgments may subsequently be cured, it is certainly fundamental that this Court is not constituted to edit or re-write opinions of other courts, and this Court may dis-regard a choice of language of no substantial significance. This court is concerned only with judgments. The judgment here would in no way be effected by a change in the wording of the opinion of the Court of Appeals.

This Court, in the case of Herb v. Pitcairn, 1945, 324 U. S. 117, 65 S. Ct. 459, 89 L. Ed. 789, stated:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state Courts that rest on adequate and independent state grounds . . . Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions . . . In many cases the answer has been a strict adherence to the rule that it must affirmatively appear that the federal

question was decided and that its decision was essential to dispose of the case; and that where it is not clear whether the judgment rests on a federal ground or an adequate state one this Court will not review."

2. **Federal Question Raised On Re-Hearing After Judgment And Neither Entertained Nor Decided By Court Is Not Basis For Review By Certiorari.**

Herndon v. Georgia, 295 U. S. 441, 79 L. Ed. 1530:

"The long established general rule is that the attempt to raise a federal question after judgment upon a petition for re-hearing comes too late unless the Court actually entertains the question and decides it."

Mrs. Cadden's contention # 3 on re-hearing before the Court of Appeals did not present a federal question to that Court, nor was one decided. But, nevertheless, assuming for present purposes that such a federal question was presented, the above case holds that it was not presented in timely fashion.

CONCLUSION.

This Court cannot effectively review this case without creating a federal question, which the record does not and cannot produce.

APPENDIX.

The Commonwealth would be remiss in its duty to defend the integrity of its courts if it ignored petitioner's wantonly slanderous remarks and implications against its courts.

The petition attempts by use of a temporary custody opinion of a Chancellor of the Jefferson Circuit Court in a divorce proceeding to discredit and hold suspect the integrity of the Court of Appeals and more particularly Honorable Loraine Mix, Judge of the Jefferson Circuit Court, Criminal Branch, who presided over the inquest. An attempt as gross and as unfounded in fact as this is in itself a classic example of paranoid thinking and conduct.

A brief reference to the facts of Judge Mix's career on the Bench, plus the observation that he was sustained by the Court of Appeals upon full review, and the opinion of the Chancellor has not yet been accepted for similar review, should suffice.

Judge Mix is now beginning his nineteenth year on the Criminal Bench, having been elected by the largest majority for four consecutive terms. Public satisfaction in the conduct of his duties in office was clearly voiced in these majorities. In 1945, he was unopposed when standing for his third term. In his eighteen full years, Judge Mix has presided over more than 7,000 jury trials, over 5,000 of which involved felonies. **During this time he has been reversed only twice.**

In the same eighteen years, and in addition to the above jury trials of offenses against the State, Judge Mix has presided over 8,000 lunacy inquests. **On these he has never been reversed.** Judge Mix has established a firm and seldom-equalled reputation for fairness and judicial integrity, as well as a capacity to justly and efficiently administer the enormous press of business before his Court.

The same cannot be said for the Chancellor who failed to be re-elected after one term, and who wrote

the opinion referred to herein after defeat for re-election.

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